

ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of)

Implementation of the Cable Television)
Consumer Protection and Competition)
Act of 1992:)

Leased Commercial Access)

CS Docket No. 96-60

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**REPLY COMMENTS OF
VIDEO INFORMATION PROVIDERS FOR NON-DISCRIMINATORY ACCESS**

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Video Information Providers for Non-discriminatory Access (VIPNA) is a national, non-profit trade association committed to non-discriminatory access to electronic distribution of independent video programs. VIPNA's goals are to diversify programming choices, encourage competition and investment in quality programming, and advocate a reliance on market forces to replace monopsony control of television program distribution.

"The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." This introduction to 47 U.S. Code, Chapter 5, Section 532, is the underlying rationale for commercial leased access. Leased access is not intended to subsidize programming entrepreneurs; it is the government's attempt to safeguard the interests of television viewers by allowing for diverse editorial viewpoints to be delivered via single-gatekeeper cable systems. As long as cable operators are the sole gatekeepers of programming delivered within exclusive franchises, their subscribers are captive to the operators' total editorial control over that programming. The Commission has a statutory obligation to minimize cable operators' total editorial control over program selections.

The cable industry has avoided its diversity obligation for twelve years, since enactment of the 1984 Cable Act. It will continue to subvert Congress, the FCC, the law and viewers' interests, until the Commission adopts and seriously enforces rules that will force operators to comply.

These Reply Comments refute a few Comments made by one or more cable operators and/or programmers. Underlined text indicates an original or paraphrased comment to which we are responding.

I. The Goal of Diversity Has Already Been Achieved

Congress intended for leased access to provide television viewers with a diverse editorial point of view from sources *other than a single cable operator*. Although many standard channels are not affiliated with the operator, the operator still makes the editorial choice for the subscriber by choosing which programmers to carry. As long as cable systems operate as exclusive, closed systems controlled by individual gatekeepers, then viewers will not be served by a diversity of *sources*.

II. The Perceived Value of Leased Access Programming

The new rules will insure that programming of little value prevails over programming that consumers and cable operators demand.

Consumers demand local programming and system-specific leased access programmers are structured and motivated to provide this niche service to subscribers. ESPN's national sports programming will not be replaced by local high school sports; the two programmers can co-exist on the same cable system.

Programming of "little value" will draw a very small audience and result in very small revenues in any market. If a new programmer uses leased access to gain carriage,

but earns very little revenue, that business will fail. The market is the best barometer for value. The cost/market rule opens a bottleneck in the market and allows market forces to determine value. ESPN possesses no infinite wisdom in determining the value of programming and the market might dictate that ESPN2 has little value.

Leased access will be unfairly subsidized and will undermine the value of the program tier.

The Commission's proposed rate formula, when used on a channel-by-channel basis, would adequately compensate an operator for the actual cost to administer leased channel capacity. The Commission has already determined that operators are well-compensated by subscriber rates, even at regulated levels. Those profits are likely to increase as subscriber rates become de-regulated.

Operators have offered no data to support their contention that they will suffer subscriber attrition directly as a result of changing 15% of the program choices. Were program tiers de-valued when must-carry and PEG access were mandated? Leased access will take up such a small percentage of system capacity that most subscribers won't even notice the change.

Leased access will result in a repetition of programming.

While we do not support any increase in repetitive programming, it is important to point out that cable operators currently carry an enormous quantity of repetitive programming in the form of infomercials. The demand for repetitive programming decreases with each repetition. Any lessee realizes that he may lose out in a competitive

market if his programming is not fresh and new. Those lessees that repeat too much will lose audience share and reduce their profit.

It is in any programmer's interest to provide a differentiated product or risk failure in the marketplace. The market itself will dilute repetitive programming. Congress mandated that leased access should be available to give subscribers the "widest possible diversity of programming sources." It is to counter the similarity of gatekeeper-controlled programming that Congress and the Commission is attempting to achieve with reasonable leased access rules.

If it is easier to get carriage on a cable system, then the only programmers who will get on will be infomercials and home shopping networks.

This is a valid point. The solution is to not eliminate program categories when calculating the cost/market rate. Otherwise, as TELEMIAMI states, when home shopping channels are included with advertiser-supported channels, only home shopping and adult programmers will be able to afford leased access.

There are over 200 cable networks ready, willing and able to deliver programming to subscribers and very few of them are infomercial and home shopping networks. The market (cable subscribers) will tolerate only so many infomercial and home shopping networks. After a saturation point (which may already be the case) subscribers will stop watching and buying products from these networks. Then some of the networks will fail and change their programming or they will go out of business. It would be impossible, in a market economy, for too many of anything to succeed and if they did, it would only be a response to what the market wanted.

III. Standard Programmers Will be Forced Off the Air to Accommodate Leased Access

A cable operator will save money by bumping C-SPAN, which appeals to a small portion of viewers, to accommodate a leased access programmer.

This argument only further proves the fact that operators have greatly harmed the independent and emerging network industry with their obstruction of leased access. Operators have filled set-aside capacity for the past twelve years and now complain about the need to "force" programmers off the air.

It is very unlikely that a cable operator will ever drop C-SPAN because it has enormous value as a political tool for the cable industry. Operators threatened the same thing in response to the must-carry mandate.

A cable operator always has the opportunity to save money by replacing C-SPAN or The Learning Channel with other, more profitable, programmers. They do not because they know these channels are popular with subscribers. Operators that bump educational or popular channels to accommodate leased access would obviously be doing so only to spite the Commission and antagonize subscribers.

Congress specifically intended to control the flood of programming, produced by a single gatekeeper and distributed by that same gatekeeper, by allowing for a small percentage of cable channels to be leased by independent programmers. If any networks are "forced" off the air, they should be low-value channels.

The FCC should include transitional rules acknowledging the enormous investment of nearly 100 new programming networks.

The transition period began in 1984. To lengthen the transition period after 12 years is absurd.

Existing standard carriage networks knew that they were using set-aside and chose to take a risk. When you park your car in a no parking zone, you take the risk and you pay for getting towed.

If the Commission wants to entertain any type of transition period, it should concentrate on migration. For example, allow networks less than two years old to migrate to leased access.

"Traditional" programmers would be severely impeded in continuing to distribute their existing services and be irreparably harmed in their ability to develop new high quality services.

If traditional programming means "those programmers selected by a cable operator" then this is exactly what Congress intended. (Which is like saying "if it rains, the ground will get wet".) "Traditional" programmers are not being forced off the air. Rather they will suffer the downside of the risk they took when they obtained carriage within the set-aside capacity.

Leased access programmers have been severely impeded and irreparably harmed for twelve years. Leased access can add *new* voices to the cable mix, not the same voices duplicated many times

The rules will have a disastrous impact on new and developing quality programming networks.

This may be true for the few networks that have launched based upon the non-leasing model. A transition period that allowed migration would mitigate this problem.

IV. The Proposed Cost/Market Rate Formula

The FCC incorrectly attributes low leased access demand solely to leased channel rates without considering other significant reasons.

This claim is partly true. Leased access capacity is underused because of cable operator mitigation and restraint tactics; such as, refusing to quote rates, refusing to negotiate in good faith, sabotaging programs with mysterious "technical difficulties," changing channels or simply refusing to put leased access programs on the air.

This argument is also at fault in its claim that leased access "demand" is low. The demand is adequate, as evidenced by dozens of complaints on file with the FCC and numerous comments filed in this proceeding. Operators' cooperation and compliance with the law is low.

The implicit fee is a surrogate for revenue the operator would otherwise have earned from its use of the channel. The extra amount is compensation for the operator's loss of editorial control. The proposed formula will lead to zero or negative numbers.

Operators have failed to provide any actual data to support their contention that they will suffer financial harm if the maximum leased access rate is decreased. We haven't been able to test the veracity of operators' numbers; however, zero or negative results would only further prove that operators are over-compensated by subscriber fees.

The history of customer satisfaction with cable operators sheds great doubt on the claim that "cable operators know best what customers want." An audit of a typical cable operator's line-up changes over a two year period would likely show that the changes were based more upon the lucrativeness of the programming deal than customer demand for the programming. For example, cable operators somehow find new networks in which they have an equity interest coincidentally more interesting to subscribers. At the same time other new networks, in which no equity is owned by cable operators, are shut out of channel line-ups in spite of the fact that their programming is perhaps more interesting to cable subscribers. (The Parenting Network and The Auto Channel are two examples.)

The [proposed] formula understates cost to operators because it assumes that subscribers will be utterly indifferent to the loss of quality cable programming in favor of low budget leased access programming.

Quality is subjective and impossible to measure under the current regulations. Operators have kept leased access programming is kept off the air for a variety of reasons. If the leased access program is "good" quality, it may be denied access because the operator fears competition or additional requests for access. Similarly, "low" quality programming may be kept off the air because operators fear it may be too successful (many low-budget television programs have been very popular with viewers). All

programmers face a diverse and fragmented audience of television viewers and can only serve them better by providing *more* variety, not less.

This statement implies that all leased access programming is of low quality and low budget. If the Commission is successful in deploying rules that meet the Congressional mandate, then some of the 250 emerging cable networks will finally gain cable carriage. These networks are extremely diverse in subject matter and financial backing. However, there is absolutely no evidence that would support the fact that they are all of low quality and low budget.

The "opportunity cost" doesn't adequately compensate an operator for its ability to package channels. By using audience demographics, an operator can add or subtract channels to capture an additional 1% of audience.

No real data exists to support this premise. The solution is to compare systems with and without leased access. Leased access, like must-carry or PEG access, occupies a small fraction of total channel capacity. It will have very little impact on an operator's ability to package 85 - 90% of the system.

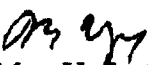
The FCC's proposal is exceedingly complicated and burdensome to apply and utterly fails to measure and drastically understates costs.

The Commission's proposal is economically sound and workable except for one variable: the data supplied by operators. Since 1984, cable operators have refused to supply the necessary data to prospective lessees and hampered the Commission's attempts to enact reasonable rules. It would be foolish to assume that operators will

suddenly give up their resistance to leased access after all this time. The Commission should adopt a nominal rate that operators have the burden of rebutting based on actual data. We agree with the proposal offered by TELEMiami in comments filed in this proceeding (pages 16-21). A nominal fee of between \$.01 and \$.05 per subscriber per month would substantially compensate the operator. The burden of proof would be on the operator to rebut the nominal rate by providing the Commission with cost data. This approach puts the onus on the party with access to the information and removes a significant barrier to leased access.

The Commission can further reduce its regulatory burden by instituting an informal problem resolution procedure. Cable Bureau staff should be able to resolve many leased access problems, before they get to the official "complaint" stage, on the telephone or in writing.

Respectfully submitted,


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